FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

VS.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE STATE PETITIONER

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REPLY BRIEF FOR THE STATE PETITIONER

I.

RETROSPECTIVE NOTICE RELIEF WHICH TRIGGERS FAIR HEARING REQUESTS FOR RETROACTIVE BENEFITS VIOLATES THE LAW OF THE CASE AS ESTABLISHED IN *EDELMAN V. JORDAN.*

Plaintiffs unsuccessfully argue that the *en banc* order simply involves a notice to class members respecting the right to request a fair hearing to attempt to recover benefits, an issue "neither presented nor decided in *Jordan I* and therefore the doctrine of the law of the case is not properly invoked." (Resp. Br. p. 11) This assertion is premised upon a narrow reading of *Edelman* v. *Jordan*, 415 U.S. 651 (1974), as limited to an "award of damages or restitution" or "relief which compensates *per se* for the Illinois official's violation of the law." (Resp. Br. p. 14)

Such a reading of *Edelman*, particularly in the very litigation in which the Eleventh Amendment's bar was successfully raised, is inappropriate. Plaintiffs wholly ignore that Mr. Justice Rehnquist's synopsis of Eleventh Amendment jurisprudence emphasized as a guiding principle this Court's statement in *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945) to the effect:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." 415 U.S. at 663.

The question to be answered therefore in every Eleventh Amendment controversy is whether the relief sought is against the non-consenting state, that is, whether the state is "the real substantial party in interest." Relief in the form of damages, restitution or compensation *per se* is

but one example of the types of relief which implicate the state as the real party in interest.

"Behind the words of constitutional provisions are postulates which limit and control", *Monaco* v. *Mississippi*, 292 U.S. 313, 322 (1934), and one such postulate of the doctrine of sovereign immunity is whether the relief requested "will require affirmative action by the sovereign", *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 at 691 n. 11 (1949). Put another way, will the relief prayed for entail "interference with governmental property" or bring "the operation of governmental machinery into play."? Id. at 715 (Justice Frankfurter, dissenting). These principles of sovereign immunity are fully applicable to the relief in question here.

It is submitted that retrospective equitable relief in the form of a notice designed to trigger fair hearings which may result in retroactive monetary awards also implicates the state as the real party in interest and thus violates the bar of the Eleventh Amendment and the principles of sovereign immunity.

There are several reasons why this is true under the circumstances of this case. First, Judge Wood, writing for the Seventh Circuit, expressly conceded in the *en banc* decision that "the state, not merely an officer, would be directly involved in any relief granted." *Jordan* v. *Trainor*, 563 F. 2d 873, at 875 (7th Cir. 1977). Second, even in the absence of such a concession, the record here shows that the relief will significantly intrude upon the operations of state government, including the mailing of over 20,000 notices, handling requests for hearings, full evidentiary hearings, final administrative decisions on each appeal, judicial review in the event of adverse administrative rulings, and payment of substantial state funds if Plaintiffs ultimately prevail.

Third, notice relief is a mere subterfuge by which Plaintiffs hope to achieve, by the exercise of federal judicial power, a monetary award which this Court has declared to be prohibited by the constitution. Fourth, notice relief is not permissible prospective injunctive relief against the officer, since it will result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman,* 415 U.S. at 668.

Fifth, Petitioner Quern has not and is not conducting himself in a manner which violates the rights of the plaintiff class or ignores the obligations of the state. This lawsuit arose in 1971 and involved rights and obligations under Title XVI of the Social Security Act, (AABD program). During the period from July 1, 1968 to April 17, 1971, Petitioner's predecessor four times removed failed to abide by federal time standards for promptly acting upon applications for assistance. As of April 17, 1971, state officials were enjoined to conform their conduct to the requirements of 45 C.F.R. § 206.10(a)(3). Federal requirements with respect to notice of the right to a fair hearing, 45 C.F.R. § 205.10, were not then (A. 6, Complaint) and are not now (A. 31, Motion to Require Notice to Members of the Plaintiff Class) in issue.

Moreover, as of January 1, 1974, any rights and obligations under former Title XVI with respect to notice were extinguished due to the repeal by Congress of the AABD program and its replacement by the wholly federally funded Supplemental Security Income program. See, Pub. L. 92-603, Title III, § 301, 86 Stat. 1465. If this Court approves Plaintiffs' motion for notice relief, and should retroactive benefits ultimately be paid to the plaintiff class, there is little likelihood that the Federal government would recognize an obligation to provide federal financial participation for assistance payments relating to a defunct program. For Illinois to bear the entire cost of retroactive AABD payments is not consistent with principles of "cooperative federalism" which characterized former Title XVI of the Social Security Act.

Finally, Public Assistance programs in Illinois are funded by means of annual appropriations measures and payment of assistance benefits by state warrants is limited by provisions of state law. *See, Ill. Rev. Stat.,* Ch. 15, §§ 201, 210.04, 210.16, State Comptroller Act; Ch. 130, §§ 10, 11; State Treasurer's Act. In particular, the Director of Public Aid may not request the Comptroller to draw, or the Treasurer to make payments from funds appropriated for a current fiscal year for an outstanding obligation incurred during a prior fiscal year without the express authorization from the legislature. *Ill. Rev. Stat.,* Ch. 127, § 161 (1977); 1976 *Illinois Attorney General's Report and Opinions,* No. S-1053. As a result of the lapsing of the Public Aid appropriations for fiscal years 1968, 1969, 1970 and 1971, members of the plaintiff class would be required to resort to filing claims against the state in the Illinois Court of Claims, *Ill. Rev. Stat.,* Ch. 37, § 439.1 *et seq.* (1977). In this regard, it should be noted that awards by the Court of Claims are not judicial orders, but mere recommendations to the Illinois General Assembly which is free to appropriate the funds or not as it deems appropriate. *See, Siefert* v. *Standard Paving Co.,* 64 Ill. 2d 109, 335 N.E. 2d 537, 541-42 (1976).

In sum, the relief which plaintiffs seek is directed against the State of Illinois and not Director Quern as the state is "the real, substantial party in interest". Notice relief as envisioned by the Court of Appeals, while not consti-

tuting compensation *per se,* will necessitate "affirmative action by the sovereign" and will bring into play "the operation of governmental machinery." Such relief runs afoul of the law of the case as established by this Court in *Edelman.*

II.

THIS CASE DOES NOT INVOLVE A STATUTORY OR REGULATORY RIGHT TO NOTICE

Respondents in Section IB of their brief attempt to justify the notice relief on the basis of Federal and State law. But this case was neither brought nor developed as a statutory or regulatory right to "notice" case based on any contention that applicants for AABD had not received proper notice of their entitlement to benefits or of their right to an agency appeal.

The complaint charged that the Illinois Department of Public Aid was not processing AABD applications within the time frame required by federal regulations under the Social Security Act, and further, that when grants were authorized, they commenced only with the month in which an application was approved. Count I is based solely on the statutory ground while Count II is the constitutional equal protection claim and also relies on a State statute. See also *Edelman* v. *Jordan, supra,* at 653-656 n. 1-4.

Nowhere in the complaint, or for that matter, in any of the orders or judgments or decisions until motion on remand in the District Court, is there any reference to any of the statutory and regulatory notice provisions cited in respondents' brief.

Respondents cite *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) in support of their argument of a statutory mandate and a guarantee of due process (Respondents' brief, p. 17). But due process rights have never been an element of this case.

The only constitutional claim in the complaint was an equal protection argument, which this Court said was not "wholly insubstantial" under *Hagans* v. *Lavine,* 415 U.S. 528 (1974), and therefore enough for pendent jurisdiction over the statutory claim. *Edelman* v. *Jordan, supra,* at 653, n. 1.

It was and is *totally irrelevant* whether public aid recipients in Illinois can bring class actions. (Resp. Br. p. 16). The issue before this Court is whether the Eleventh Amendment is a bar to an equitable order to provide notice to the class sanctioned by the Court of Appeals *en banc.* The availability of relief in the State courts, whether to a class or only to individuals separately under the Illinois Administrative Review Act, Ill. Rev. Stat. (1977), ch. 110, § 264-279, is not before the Court.

So also is there no relevancy to the citation of the Illinois Appellate Court decision of *Isabell* v. *Department of Public Aid,* 18 Ill. App. 3d 868, 310 N.E. 2d 742 (1974) (respondents' brief, pp. 18-19). It may in fact be that if this Court should sustain the notice relief approved below, and class members bring administrative fair hearings, that *Isabell* may be material on whether any limitations bar these appeals. But that affects only the possible ultimate result, and not whether the District Court could order any such notice.

Petitioner similarly contends that there is no relevancy to the citation of the case of *Johnson* v. *Dept. of Public Aid,* 3 Ill. App. 3d 1045, 279 N.E. 2d 791 (1972) at p. 18 of respondents' brief. The case is cited for the proposition that the State of Illinois has in the exercise of its sovereign power consented to suits in the state courts for "corrective payments" of money from the state treasury. If it were material, that case is not the law, for the Illinois Supreme Court has since held in a welfare case that while

the state courts may find that plaintiff is entitled to payments withheld, they may not enter a monetary judgment against the State. *Campbell* v. *Department of Public Aid,* 61 Ill. 2d 1, 329 N.E. 2d 225 (1975).

It is significant that the fair hearing statute (42 U.S.C. § 1382(a)(4), the regulation for corrective payments retroactively after fair hearings, (45 CFR § 205.10(a)(18), and the regulation making federal financial participation available for retroactive assistance (45 CFR § 205.10(b)(2) cited by respondents, were all relied upon by Mr. Justice Marshall in dissent (joined by Mr. Justice Blackmun) in *Edelman* in support of the position that the Federal Courts could order the States to make retroactive payments to public aid recipients. *Edelman* v. *Jordan, supra,* at 692-693. The majority felt otherwise. *Edelman* v. *Jordan, supra,* at 674-675, n. 17.

III.

NOTICE RELIEF UNDER RULE 23(d)(2) F.R.C.P. WAS NOT AN ISSUE BELOW AND IS NOT REQUIRED FOR PROSPECTIVE RELIEF.

At no time from the very beginning of this case in January 1971 until the filing of their brief in this court in August 1978 had Plaintiffs ever asserted the right to notice to the class under any of the provisions of F. R. Civ. P. 23.

The parties differ as to whether the relief granted by the District Court was on behalf of a class which had in fact been certified.* Neither the District Court in ordering notice to the class, nor the Court of Appeals below *en banc,* ever mentioned Rule 23 in their opinions. The Court

*See Petitioner's Brief at 6, n. 4, 25, 27; Respondent's Brief at 14-15, n. 5.

of Appeals considered the constitutionality of "a mere explanatory notice" advising applicants that there was a state administrative procedure available to them. *Jordan* v. *Trainor,* 563 F. 2d 873, 875 (1977) (A. 67).

It is important to note that notice under Rule 23(d)(2) is a purely discretionary provision for the members of a Rule 23(b)(2) class. See, 3B MOORE'S FEDERAL PRACTICE, § 23.72 (2d ed. 1974). In fact, there is a question whether a class was ever certified under Count II. Assuming that there was a properly certified class, it would certainly come under the definition of a (b)(2) class:

> (2) the party opposing a class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; (See, Preliminary Injunction Order, par. 8, A. 19).

It certainly was not a (b)(3) class, or individual notice would have had to be sent to all members of the class who could be identified through reasonable effort. Payment for the notice would have been at the expense of the Plaintiffs. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 180 (1974).

None of the cases cited by Respondent is in point on a discretionary notice. Among these cases, *Greenfield* v. *Villager Industries, Inc.,* 483 F. 2d 824 (3rd Cir. 1973); *Turoff* v. *Union Oil Company,* 51 F.R.D. 51 (N.D. Ohio 1973); and *American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538 (1974) all involved 23(b)(3) classes. The issue in *Greenfield* was whether the notice of proposed settlement satisfied the requirements of Rule 23(c)(2). Both *Turoff* and *American Pipe* were motions for class certification and both were denied. In *Rothman* v. *Gould,* 52 F.R.D. 494 (S.D. N.Y.

1971), also cited by Respondent, there was a motion that the action not be maintained as a class. The Court found that notice was necessary so that the "class members" could oppose the motion or seek to be substituted as representatives. Nor is *Doe* v. *General Hospital,* 434 F. 2d 427 (D.C. Cir. 1970), the only other case cited by Respondent, analogous authority. The facts in that case involved a motion for civil contempt for violation of a preliminary injunction. The Court remanded with instructions that if the trial Court should find harm to the class it should consider whether affirmative action should be required and whether relief might be fashioned under Rule 23(d)(2).

Respondents' argument for a 23(d)(2) notice completely overlooks the fact that if there were ever a time for such a notice, it was not by the District Court on remand after the decision of this Court in *Edelman* v. *Jordan.* Conceivably notice might have been ordered sent when the case first began, had the complaint alleged a notice violation under federal or state law. But there was no possible occasion for notice by the District Court on remand from the decision of this Court. As far as the Federal Courts were concerned, the case was over, except for modifying the prospective portions of the injunction to conform to then existing federal time standards. (A 29-A.30). The notice Respondent seeks has nothing to do with a class action under Rule 23. Possible administrative avenues of relief were purposefully ignored by Plainitiffs (Complaint, par. 27 and 39, A. 12, A.14) when they elected to file in Federal Court. Respondents are straining beyond any rational extent both the letter and spirit of Rule 23 by contending that the notice they seek to uphold can come under that Rule.

IV.

PRINCIPLES OF SOVEREIGN IMMUNITY AND FEDERALISM ARE VIOLATED BY THE NOTICE RELIEF ENVISIONED BY THE APPELLATE COURT.

A.

The Principles Of Sovereign Immunity Embodied In The Eleventh Amendment Are Not Limited To Suits For Monetary Relief.

For the reasons set forth in Part I, *supra,* notice relief designed to trigger fair hearings, state judicial review, and possible legislative action fails to "respect" the rights of the sovereign to be immune from suit without its consent. Contrary to Plaintiffs' assertions (Resp. Br. p. 23-31), notice relief substantially "intrudes" upon institutions of state government by requiring affirmative action by the sovereign to secure for Plaintiffs monetary relief directly barred by the principles of sovereign immunity as articulted by this Court in *Edelman.*

Those principles are not limited as Respondent suggests (Resp. Br. p. 27), to cases seeking to *directly* intrude upon the treasuries of the States. As Mr. Justice Stewart has observed in a different context certain types of claims are barred by sovereign immunity because they "necessarily involve claims against the Treasury". *Brown* v. *General Services Administration,* 425 U.S. 820, 826 (1976) (a suit for promotion by a federal employee) As in that case, this Court should not be required as a result of artful pleading to suspend its disbelief that as long as the suit is nominally against the officer the principles of sovereign immunity are not thereby implicated. *Id.,* at 833.

Notice relief constitutes an indirect invasion of the state treasury and thus, the principles of sovereign immunity,

which apply to the federal and state sovereigns alike, are sufficiently broad to bar the relief here. Even were this case not one seeking monetary relief indirectly, the principles of sovereign immunity would be violated anyway since the mandate of the court would affirmatively affect the administrative and judicial, if not legislative, apparatus of the state. This Court's ruling in *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949) precludes such a result.

B.

The *Edelman* Court's Distinction Between Prospective And Retrospective Relief Advances The Underlying Notions Of Comity And Federalism.

Edelman v. *Jordan*, 415 U.S. 651 (1974) and *Milliken* v. *Bradley*, 433 U.S. 267 (1977) have restructured the features of "Our Federalism" by recognizing that relief which looks to "conduct and consequences completed in the past", *Milliken* v. *Bradley, supra*, 97 Sup. Ct. 2749, 2762 n. 21, is out of harmony with the prospective-compliance exception to sovereign immunity which had its genesis in *Ex Parte Young*, 209 U.S. 123 (1908).

Respondent's notions of federalism (Resp. Br. pp. 32-47) would, if accepted by this Court, undermine rather than serve that important doctrine. The distinction between prospective and retrospective relief balances the competing interests of federal supremacy and state sovereignty by giving force and effect to the terms of both the Eleventh and Fourteenth Amendment to the Constitution of the United States. Plaintiffs would have this Court severly limit the scope of the Eleventh Amendment while expanding the Fourteenth Amendment. Not only is such a result impermissible under established rules of constitutional construction, but it is wholly unsupported by the record in this case which involved at its inception primarily a supremacy clause issue pendant to a Fourteenth Amendment claim never reached nor resolved by any court below.

Plaintiff's charge, that the distinction between prospective relief and retrospective relief is "flawed" (Resp. Br. p. 34), is a thinly disguised effort to turn back the clock of "Our Federalism" to some pre-*Edelman* time. As the *Milliken* v. *Bradley* court found, the distinction is one that works and can be fairly shaped to the contours of a given case to afford appropriate prospective relief. Under any fair appraisal of the relief sought here, notice to members of the plaintiff class, with respect to rights under a terminated federal state/program, is retroactive, essentially compensatory and disruptive of sound principles of federalism.

V.

42 USC § 1983 CANNOT BE INTERPRETED TO PERMIT RETROSPECTIVE NOTICE RELIEF AGAINST A NONCONSENTING STATE UNDER *EDELMAN*.

When Respondent was previously before this Court in *Edelman*, the argument was made that the Fourteenth Amendment worked a sufficient limitation upon the Eleventh Amendment so as to permit an award of equitable restitution against the State.

Respondent now argues that not the Fourteenth Amendment, but a statute, 42 U.S.C. § 1983, is itself a limitation upon the use of the Eleventh Amendment by a state to assert its sovereignty.

Respondent relies on three recent decisions of this Court. The first is *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). There this Court upheld an award for retroactive retirement

benefits payable from the State Treasury provided for under Title VII. *Edelman* v. *Jordan* did not apply because Title VII was passed under the enforcement power granted to Congress under § 5 of the Fourteenth Amendment, and 'the threshold fact of Congressional authorization' to sue the State as employer was clearly present.

Respondent relies in large measure on *Monell* v. *Department of Social Services,* —— U.S. ——, 98 S. Ct. 2018 (1978), which held that municipal corporations could be liable in damages under § 1983. But that case specifically did not pass on the question of the immunity of a state for retroactive damages under the Eleventh Amendment. 98 S. Ct. at 2035, n. 54. See also n. 55 at 2036. Moreover, the *en banc* decision of the Seventh Circuit does not rest upon a conclusion that the term "person" for purposes of § 1983 includes sovereign states, as opposed to state officials, within its ambit. That issue is not the issue before this Court on Petitioner's Writ for Certiorari.

Hutto v. *Finney,* —— U.S. —— 98 S. Ct. 2565, (1978) did not answer the specific question either. The District Court award of attorney's fees based on bad faith, was upheld against the asserted defense of the Eleventh Amendment, by going back to the distinction between prospective and retroactive relief of *Edelman* v. *Jordan.*

While Respondent tries to use *Hutto* to shore up his arguments for broad equitable powers to the Federal Courts, the case says that these broad powers are available against state officers in their official capacities for prospective relief only.

> And in *Edelman* v. *Jordan* (citation omitted), when the Court held that the Amendment grants the States an immunity from retroactive monetary relief, it reaffirmed the principle that state officers are not immune from *prospective* injunctive relief.
>
> • • •

> . . . In exercising their *prospective* powers under *Ex parte Young* and *Edelman* v. *Jordan,* federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. . . . Id. at 2573-2574 (emphasis added).

So also the affirmance of the award of attorney's fees against the state officials by the Court of Appeals under the Civil Rights Attorney's Fees Awards Act of 1976 (Pub. L. No. 94-4459, codified in 42 U.S.C. § 1988) does not rule directly on the question now before this Court.

The Attorney General of Arkansas did not question the power of Congress to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. He contended, however, that even a plain indication of legislative intent to exercise that power to authorize fee awards against the state officials was not enough, that Congress had to enact express statutory language making the States liable if it wished to abrogate their immunity.

This Court in upholding the award of attorney's fees under the Act did not say this contention was wrong, but distinguished the cases:

> But these cases concern retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief. Id at 2576.

The Court stressed that costs (and thus attorney's fees under the Act) were different from "retroactive liability for prelitigation conduct."

> Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity . . . The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants. Id. at 2576.

> This conclusion is consistent with the reasons for requiring a formal indication of Congress' intent to abrogate the State's Eleventh Amendment immunity. Id. n. 27 at 2577.

Defendant submits that it is anomalous for Plaintiffs to argue that relief in the form of a notice designed to secure retroactive benefits is permissible under § 1983 while such benefits themselves cannot be awarded under the Fourteenth Amendment against a nonconsenting state. No post-*Edelman* decision of this Court even remotely supports Plaintiffs' theory.

CONCLUSION

Petitioner Quern respectfully requests this Court to uphold the integrity of its prior decision in this case and to reverse the *en banc* decision of the Seventh Circuit Court of Appeals with directions to bring this extensively litigated case to an end without further attempts to relitigate issues foreclosed or evade the bar of the Eleventh Amendment.

Respectfully submitted,

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